IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1007

H. EARL FULLILOVE, *et al.*,
Petitioners,

v.

JUANITA KREPS, Secretary of Commerce of the United States of America, *et al.*,
Respondents.

BRIEF AMICI CURIAE OF AMERICAN SAVINGS & LOAN LEAGUE, INC. AND NATIONAL ASSOCIATION OF BLACK MANUFACTURERS, INC. IN SUPPORT OF RESPONDENTS JUANITA KREPS, ET AL.

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October 9, 1979

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INTEREST OF AMICI

The American Savings & Loan League, Inc. (hereinafter "ASLL") and the National Association of Black Manufacturers, Inc. (hereinafter "NABM"), pursuant to Supreme Court Rule 42, respectfully submit this brief amici curiae. Counsel for all parties have consented to the filing of this brief, and their consents have been filed with the Clerk of this Court.

ASLL and NABM are minority trade associations whose growth and development parallel—and depend upon —the growth and development of American minority busi-

ness enterprise. The ASLL, a non-profit corporation organized under the laws of the District of Columbia, was founded in 1948 as a national organization of black-owned savings and loan associations. It grew slowly until 1968, when it was reorganized and received a technical assistance grant from the Department of Commerce's Economic Development Administration (hereinafter "EDA"). Today, the ASLL is supported by the dues of its nearly four score members (owned and controlled by Hispanic and Asian Americans as well as Blacks) and by the Department of Commerce's Office of Minority Business Enterprise (hereinafter "OMBE"). With this support it offers training, technical assistance, and educational programs to existing minority-owned savings and loan associations and to groups interested in forming new associations.

The NABM, founded in 1971, has a membership comprised of over 800 black-owned businesses. A non-profit corporation organized under the laws of Delaware, the NABM actively lobbies on behalf of legislation of interest to minority businessmen; it was one of the initial supporters of the statute at issue here. The association also publishes a quarterly journal, *Voice of Minority Industry*, and two bi-monthly periodicals—*NABM News* and *NABM Legislative Review*. Like the ASLL, it provides technical support to minority entrepreneurs, works to develop joint venture opportunities involving minority manufacturers and large industrial firms, and collects and disseminates business data from a variety of government and private sector sources.

The NABM and the ASLL are vitally interested in the principle established by Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2) (Supp. I 1977) (hereinafter "the Set-Aside" or "the Set-Aside Amendment"). The problem attacked by that provision—racial discrimination against minority business enterprises—is one with which their members are

intimately acquainted and from which they continue to suffer. The Set-Aside Amendment, in the view of the NABM and the ASLL, attacks this problem in a constructive and effective way: it promotes the business opportunities of minority enterprises so that they can establish themselves in the mainstream of American economic life.

Minorities comprised nearly 16% of the nation's population in 1970. Yet only 3% of the businesses in the United States are minority-owned, and these businesses generate less than 1% of the gross business receipts realized by all American firms.[1] Indeed, there are no minority-owned businesses in the "Fortune 500", and only two black-owned firms in the United States—Motown Industries and the Johnson Publishing Co., Inc. (publishers of *Ebony* and *Jet* magazines)—are of sufficient size to be known to a substantial portion of the general public. The number of minority-owned firms that have "gone national" is insignificant—of the 100 largest black-owned companies in 1978, forty percent were car dealerships, and many of the rest were local service organizations of one type or another. *See The Nation's Leading Black Businesses*, Black Enterprise, June 1979, at 140-159.

The figures in the construction industry, the economic sector most directly affected by the Set-Aside Amendment, are no better. As the Department of Commerce noted in a recent report:

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[1] H.R. Rep. No. 1791, 94th Cong., 2d Sess. 124 (1977). This gross underrepresentation is evident in all sectors of the economy. Federally insured minority-owned savings and loan associations, for example, had total assets of only about $1.5 billion as of mid-1979, less than three-tenths of one percent of the total assets of $556 billion of all of the nation's federally insured savings and loan associations. *Compare* Minority Association Development Division, Federal Home Loan Bank Board, Minority S&Ls Listed According to Assets (1979) *with* News Release of the Federal Savings and Loan Insurance Corporation, at Table 3 (Sept. 28, 1979).

"The purpose of [the Set-Aside] requirement, which was introduced by Congressman Parren Mitchell of Maryland, was to help eliminate discrimination in construction and related industries and to bring minority firms into the mainstream of those industries. The extent to which minority firms have been excluded from these industries in the past is illustrated by data from the 1972 Census of Construction Industries and the 1972 Survey of Minority-Owned Businesses. These reports reveal that minorities owned only 4.3 percent of the construction firms in operation in 1972. Furthermore, minorities received only one percent of the $164.5 billion earned by all construction firms in 1972. The figures are similar with respect to those industries that provide supplies and equipment for construction firms. Minority firms represented only 1.9 percent of the total number of establishments in the wholesale trade industry in 1972 and received only 0.3 percent of the gross receipts. Minority firms' participation in Federal construction procurement in 1977 was also disproportionately low, with such enterprises performing only 1.2 percent of Federal contracts. In addition, minority and female-owned firms received less than seven-tenths of one percent of all contracting dollars spent by those state and local governments that responded to a 1973 U.S. Civil Rights Commission survey." [2]

[2] EDA, U.S. Dep't of Commerce, Local Public Works Program Interim Report: Fostering the Development and Expansion of Minority Firms in Construction and Related Industries, at 1 (Sept. 1978) [hereinafter cited as "Interim Report"].

Petitioners attempt to refute what they term a "statistical shell game" by pointing out that the gross receipts of minority owned construction firms with paid employees increased by 55% in three years, while those of all construction firms grew only 60% in five years, during the late 1960's and early 1970's. Brief for Petitioners at 17-21. The years chosen are not comparable, however, because of the cyclical nature of the construction industry. The value of all construction, for example, increased by over 40% between 1970 and 1973, but by only 10% between 1973 and 1976. Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 778 (99th ed. 1978). Similarly, petitioners cite an 85% gain in minority-owned construction business receipts between 1969 and 1972, but do not give comparable figures for that period (during the last two years of which the construction industry as a whole enjoyed unprecedented prosperity) for non-minority firms. Moreover, petitioners fail to note that, because of the small base of minority firms in the construction industry, figures on the growth of those firms are inherently unreliable and subject to wide fluctuations.

Few but petitioners would seriously dispute that racial and ethnic discrimination lie behind the virtual non-participation of minorities in American enterprise that is reflected in the figures presented above. The House Select Committee on Small Business concluded in 1972 that "the minority businessman does not play a significant role in our economy" due to major problems which, though "economic in nature, are the result of past social standards which linger as characteristics of minorities as a group." H.R. Rep. No. 1615, 92d Cong., 2d Sess. 3 (1972). The Committee repeated that finding in 1975, and again in 1977 prior to enactment of the Set-Aside:

> "[T]he testimony is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently, have not participated, to any measurable extent, in our total business system generally, or in the construction industry, in particular."

H.R. Rep. No. 1791, 94th Cong., 2d Sess. 182 (1977); *see* H.R. Rep. No. 468, 94th Cong., 1st Sess. 2 (1975).

The executive branch has reached similar conclusions. In 1970 the President observed that "members of minority groups traditionally have aspired to own their own busi-

nesses," but that "through no fault of their own [they] have been denied the full opportunity to achieve their aspirations." Executive Order No. 11,518, 3 C.F.R. 109 (1970). He repeated these sentiments in 1971,[3] the same year that his Advisory Council on Minority Business Enterprise concluded, after an extensive study of minority businesses, that "[e]normous economic inequities, the product of centuries of disregard, discrimination, and institutional racism, still exist. . . ." Minority Enterprise and Expanded Ownership: Blueprint for the 70s, at 5 (1971). Meanwhile, OMBE found no fewer than *five* times between 1970 and 1977 that racial discrimination lies at the root of minority non-participation in the economy. The OMBE Task Force on Education and Training for Minority Business Enterprise concluded in 1974, for example, that "[d]ecades of prejudice, poor educational opportunity, limited access to real management positions within American business and industry have conspired to restrict the entry of minorities into the mainstream of the nation's free enterprise system." OMBE, U.S. Dep't of Commerce, Report of the Task Force on Education and Training for Minority Business Enterprise 17 (1974). A subsequent OMBE report traced "the severe shortage of potential minority entrepreneurs with general business skills" to their "historic exclusion from various sectors of our economy." OMBE, U.S. Dep't of Commerce, Federal Procurement and Contracting Training Manual for Minority Entrepreneurs 38-39 (1975).[4]

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[3] President's Message to Congress on Expansion of Minority Enterprise Program, H.R. Doc. No. 169, 92d Cong., 1st Sess. 4 (1971).

[4] *See also* OMBE, U.S. Dep't of Commerce, Building Minority Enterprise 2 (1970); OMBE, U.S. Dep't of Commerce, Progress Report: The Minority Business Enterprise Program 1972, at 3 (1972); OMBE, U.S. Dep't of Commerce, Minority Enterprise Progress Report (1976) (forward by Secretary of Commerce Elliott Richardson).

Amici seek to participate in this case for three reasons. First, Amici believe that minority-owned business enterprises (hereinafter "MBEs") represent promising vehicles through which minorities can achieve economic self-sufficiency and overcome the effects of past discrimination. MBEs further this goal by affording minorities the opportunity to establish an economic foothold that is not otherwise readily available. The growth and development of successful MBEs will provide role models and training for minority youth and will assure that minority individuals are placed in meaningful decision-making positions and are given the opportunity to acquire the basic entrepreneurial skills needed to attain economic self-sufficiency.

Second, Amici recognize from the personal experience of their members the need for the remedial measures that have been taken by Congress to assist MBEs. When Congress was considering the Set-Aside Amendment, the promise of MBEs was just that—a promise. Despite talk of affirmative action, efforts to create economic opportunity for minorities had repeatedly fallen far short of their goals, as evidenced by the statistics cited above. By contrast, the Set-Aside produced tangible and substantial results, increasing federally funded MBE contracts by over $500 million in 1977-78. Interim Report at 13.

Third, Amici believe that Congress acted wisely in applying the Set-Aside concept first to the construction industry. That industry was severely depressed at the time the legislation was enacted, and its long history of discrimination made it a prime candidate for congressional efforts to foster MBE growth and development.

STATEMENT OF THE CASE

On July 26, 1976, Congress enacted the Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94-369, 90 Stat. 999 (hereinafter "LPWA"), appropriating $2 billion for grants to state and local gov-

ernments to fund public work projects that would generate employment in the economically depressed construction industry. Less than a year later Congress amended the LPWA by enacting the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116 (hereinafter "PWEA"). That Act appropriated an additional $4 billion for similar projects (known as Round II) and imposed the ten percent MBE Set-Aside requirement at issue here, but applied the Set-Aside to the 1977 appropriation only. The Set-Aside Amendment was added to the PWEA on the floor of the House of Representatives by Representative Parren Mitchell (D.Md.), 123 Cong. Rec. H1436 (daily ed. Feb. 24, 1977). It was approved after slight modification and eventually enacted as Section 103(f)(2) of the PWEA, 42 U.S.C. § 6705(f)(2) (Supp. I 1977). That section provides:

> "Except to the extent that the Secretary determines otherwise, no grant shall be made under this Chapter for any public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 percentum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 percentum of which is owned by minority group members . . . For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts."

The reservation of discretionary authority in the Secretary of Commerce was included, as the floor debate in the House makes clear, to allow the Secretary to grant waivers if it appears that meeting the set-aside requirements would pose practical difficulties in any local area. *See* 123 Cong. Rec. H1437-40 (daily ed. Feb. 24, 1977). Implementing regulations permit the Assistant Secretary of Commerce to waive the Set-Aside requirement if he determines that it "cannot be filled by minority businesses located within a reasonable trade area determined in relation to the nature of the services or supplies intended to be procured." 13 C.F.R. § 317.19(b)(2) (1978).[5]

The funds made available under the PWEA were distributed to state and local applicants by the EDA. In August of 1977, EDA issued *Guidelines for 10 Percent Minority Business Participation in Local Public Works Grants. See* Interim Report, Appendix A. These guidelines provide a number of ways in which the MBE requirement can be met, depending upon whether a particular project was administered through a single prime contract involving subcontracts and/or substantial supply contracts, more than one prime contract, simple contracts, or a combination of prime and simple contracts. Grantees are given considerable latitude in selecting the means by which they will satisfy the Set-Aside requirement in any particular project.

Petitioners filed this action on November 30, 1977, seeking declaratory and injunctive relief. On December 19, 1977, the district court issued an opinion upholding the constitutionality of the Set-Aside and dismissing the complaint. *Fullilove* v. *Kreps*, 443 F. Supp. 253 (S.D. N.Y. 1977). That decision was affirmed by the United States Court of Appeals for the Second Circuit on September 22, 1978. *Fullilove* v. *Kreps*, 584 F.2d 600 (2d Cir. 1978). A petition for writ of certiorari was filed with this Court on December 21, 1978, and granted on May 21, 1979. 99 S. Ct. 2403.

SUMMARY OF ARGUMENT

Congress enacted the Set-Aside Amendment in order to remedy the effects of discrimination against minority business enterprises. In doing so, it acted under the broad powers conferred on it by the thirteenth and four-

[5] Through September 5, 1978, the Commerce Department had granted 589 partial or complete waivers under these provisions. Interim Report at 18.

teenth amendments to the Constitution, under which Congress is entitled to choose the remedies it feels are most appropriate, subject to limited judicial review. If Congress' finding of past racial discrimination was rationally based, and if the means selected to remedy that evil were appropriate, its actions must be sustained. The strict scrutiny standard suggested by petitioners, based on their reading of such cases as *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), is inappropriate in such circumstances. Even if strict scrutiny is required of race-conscious acts of local government bodies, and perhaps of Congressional actions *not* based on the thirteenth or fourteenth amendments, statutes such as the Set-Aside Amendment deserve greater deference. Congress, not the courts, has been given the primary responsibility for deciding when and whether the federal government should utilize particular methods of remedying past discrimination.

The Constitution does not require Congress to conduct hearings, develop a detailed record, or make formal findings when it enacts a law. Petitioners' assertion that the constitutionality of a federal statute turns on the volume and specificity of its legislative history is contrary to settled law, at odds with accepted principles of separation of powers, and inconsistent with important public policies.

The record before Congress, viewed in its totality, clearly establishes that Congress enacted the Set-Aside to remedy the effects of past discrimination. The pervasive manner in which this past discrimination has thwarted the growth and development of minority business enterprise was fully documented not only in the legislative history of the Set-Aside provision, but also in the hearings and debate that preceded fifteen years of comprehensive civil rights legislation. Numerous studies and reports by various portions of the executive branch, and the decisions of this and other federal courts, provide additional support for the legislation.

The Set-Aside provision also satisfies the stricter standard of review suggested by Mr. Justice Brennan in *Bakke*, because it serves an important and articulated governmental objective, is substantially related to the achievement of that objective, and does not stigmatize or penalize any minority group. Even if the strict scrutiny standard of review is applied, the Set-Aside passes constitutional muster because it is a "less drastic" or "least onerous" means of satisfying the Government's compelling interest in remedying past racial discrimination.

The Set-Aside Amendment is fully compatible with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), because Title VI was not intended to foreclose race-conscious Congressional efforts to eliminate conspicious racial imbalance attributable to the effects of past discrimination. Even if the two statutes were deemed inconsistent, the Set-Aside—a later, more specific enactment—should prevail as an exception to or qualification of Title VI.

ARGUMENT

I. THE SET-ASIDE PROVISION DOES NOT VIOLATE THE FIFTH AMENDMENT.

The petitioners argue that the Set-Aside Amendment must be found unconstitutional (a) because it is not a "least onerous" or "less drastic" means of serving a compelling governmental interest, and (b) because its enactment was neither accompanied nor preceded by "detailed" congressional findings and thus cannot be shown to advance a compelling government interest.[6] These arguments fundamentally misconstrue this Court's role in reviewing the decisions of a co-equal branch of the Fed-

[6] Brief for Petitioners at 14-17, 21-28; Brief for Petitioner, General Building Contractors of New York State, Inc., The New York State Building Chapter, Associated General Contractors of America, Inc. at 11-31 [hereinafter cited as "Brief for Petitioner, General Building Contractors of New York State"].

eral government. Neither the suggested standard of review nor the presence of formal findings is constitutionally mandated.

A. The Set-Aside Amendment Should Be Upheld Because it Constitutes a "Necessary and Proper" and "Appropriate" Exercise of Congress' Constitutional Power to Remedy the Effects of Past Discrimination.

In enacting the Set-Aside Amendment, Congress utilized the constitutional powers conferred on it by the enforcement sections of the thirteenth and fourteenth amendments to the Constitution. These provisions grant Congress broad, discretionary power to remedy the effects of past discrimination by "appropriate" legislation. Its actions therefore carry with them a powerful presumption of validity. As long as Congress found the Set-Aside provision to be an appropriate remedy for past discrimination against minority businessmen, which it did, and there is a rational basis for that decision, which there was, its actions must be sustained. The "strict scrutiny" standard of review, enunciated by this Court in quite different contexts, should not be applied.

Like all federally financed programs, the PWEA is an exercise of Congress' power to spend federal funds to "provide for the . . . general welfare of the United States." U.S. Const., art. I, § 8, cl. 1. This Court traditionally has been reluctant to interfere with Congressional action taken under this express grant of constitutional authority.[7] Perhaps more importantly, the Set-

[7] *Mathews* v. *De Castro*, 429 U.S. 181, 185 (1976) ("Governmental decisions to spend money to improve the general public welfare in one way and not another are 'not confided to the Courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.' ") (quoting *Helvering* v. *Davis*, 301 U.S. 619, 640 (1937)); *Buckley* v. *Valeo*, 424 U.S. 1, 90-91 (1976) ("[The general welfare clause] is a grant of power, the scope of which is quite expansive, particularly in view of the enlargement of power by the Necessary and Proper Clause. . . . It is for Congress to decide which expenditures will promote the general welfare . . . . Whether the chosen means appear 'bad,' 'unwise,' or 'unworkable' to us is irrelevant; Congress has concluded that the means are 'necessary and proper' to promote the general welfare . . . .") (citations omitted).

Aside Amendment is an exercise of Congress' authority under section 2 of the thirteenth amendment to "pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States,"[8] and section 5 of the fourteenth amendment, which authorizes the use of federal funds to undo the effects of unconstitutional discrimination.[9]

Under all of these provisions, Congress' action is entitled to considerable deference—indeed, a substantial presumption of validity—from this Court. The Court has repeatedly observed that the Civil War Amendments' express grants of authority to Congress to "enforce" their provisions through "appropriate legislation" mean that Congress has "full remedial powers" and is "chiefly responsible for implementing the rights created by [the Amendments]." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 326 (1966).[10]

If Congress' enforcement powers under the Civil War Amendments are to be, as described by the Court in

[8] *Civil Rights Cases*, 109 U.S. 3, 20 (1883); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 439-40 (1968).

[9] *See Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Gilmore* v. *City of Montgomery*, 417 U.S. 556, 581 (1974) (White, J. concurring); *Rhode Island Chapter, Associated General Contractors* v. *Kreps*, 450 F.Supp. 338, 349-351 (D.R.I. 1978); *cf. Lau* v. *Nichols*, 414 U.S. 563, 569 (1974) (" 'Simple justice requires that public funds, to which taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.' ") (quoting Senator Humphrey's quotation of President Kennedy during the floor debates on the Civil Rights Act of 1964).

[10] *See Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 441-43; *Katzenbach* v. *Morgan*, 384 U.S. 641, 648-650 (1966); *Oregon* v. *Mitchell*, 400 U.S. 112, 127 (1970).

Oregon v. *Mitchell*, "broad," then judicial review of the exercise of those powers must be correspondingly narrow. This Court has so held:

> "The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 years before the Fifteenth Amendment was ratified:
>
> > 'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.' *McCulloch* v. *Maryland*, 4 Wheat. 316, 421.
>
> "The Court has subsequently echoed his language in describing each of the Civil War Amendments:
>
> > 'Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against state denial or invasion, if not prohibited, is brought within the domain of congressional power.' *Ex parte Virginia*, 100 U.S., at 345-346."[11]

In adopting the broad "necessary and proper" standard of review of congressional action designed to implement

[11] *South Carolina* v. *Katzenbach*, 383 U.S. 301, 326-327 (1966). *See also Katzenbach* v. *Morgan*, 384 U.S. 641, 653 (fourteenth amendment) ("It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations . . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.") *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 440-41 (thirteenth amendment); *Adikes* v. *S. H. Kress & Co.*, 398 U.S. 144, 209 (1970); *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 157 (1977).

the Civil War Amendments, the Court was applying (in a slightly different context) the standard it had announced when reviewing civil rights legislation enacted under the Commerce Clause. U.S. Const., art. I, § 8, cl. 3. Thus, in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964), the Court noted that the commerce power "is a specific and plenary one authorized by the Constitution itself," and held that the "only questions" that need be raised to ascertain the constitutionality of civil rights legislation premised upon that power are "(1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate." *Id.* at 258-259. *See also Katzenbach* v. *McClung*, 379 U.S. 294, 303-304 (1964).

If the Set-Aside Amendment is judged by the standard applied in these cases, it should be upheld if Congress' conclusion that the Set-Aside was needed to remedy past discrimination against minority businesses has a rational basis, and if the means selected by Congress are reasonable and appropriate. The evidence before Congress of past discrimination against minority businesses unquestionably provides a rational basis for this legislative action.[12] As bluntly observed by the Second Circuit below, "[t]he amendment makes no sense unless it is construed as a set-aside to benefit minority subcontractors," and "any purpose Congress might have had other than to remedy the effects of past discrimination is difficult to imagine." *Fullilove* v. *Kreps*, 584 F.2d 600, 604-05 (2d Cir. 1978), *cert. granted*, 99 S.Ct. 2403 (1979). Moreover, the means that were selected to remedy the effects of past discrimination and that were embodied in the Set-Aside

[12] *See University of California Regents* v. *Bakke*, 438 U.S. at 307-310. Petitioners conceded below that "a compelling state interest is present if the racial classification is intended to remedy the vestiges of present and/or past discrimination." *Fullilove* v. *Kreps*, 584 F.2d at 603. Legislation that serves a compelling state interest is, a fortiori, rationally based.

Amendment are similar to those previously found "reasonable and appropriate" by this Court. *See, e.g., United Jewish Organization* v. *Carey*, 430 U.S. 144 (1977); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976). Because remedying past racial discrimination provides, at the very least, a rational basis for legislative action, and the means selected are reasonable and appropriate, the Set-Aside Amendment should be upheld.[13]

[13] Petitioners contend that the Set-Aside violates the Fifth Amendment because it discriminates against firms that are neither owned nor controlled by members of the minority groups named in the legislation. The argument fails because it overlooks Congress' broad powers under the enforcement clauses of the Civil War Amendments to take special steps—whether or not those steps might otherwise be barred—to aid those freed from slavery as a result of a civil war and several constitutional amendments. Such actions serve the express and dominant purpose of the Civil War Amendments, recognized by this Court shortly after their ratification:

> "We repeat then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. . . .
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> * * * *
>
> "We do not say that no one else but the negro can share in this protection. . . . But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it."

Slaughter House Cases, 83 U.S. 36, 71-72 (1872). *See also Strauder* v. *West Virginia*, 100 U.S. 303, 306 (1879) ("[The fourteenth amendment] is one of series of constitutional provisions having a common purpose; namely, securing to a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy . . . ."). Inherent in that purpose is the power

The petitioners argue that the Set-Aside Amendment, like the race-conscious actions of state and local governments, must survive "strict scrutiny" before this Court may uphold it—that is, that the statute must be shown to be a "less restrictive means" of accomplishing a "compelling governmental interest." While, as we show in Part I, D. *infra*, the statute satisfies even these stringent tests, petitioners' legal arguments lack merit.

First, the cases cited by petitioners—notably *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), *Personnel Administrator* v. *Feeney*, 99 S.Ct. 2282 (1979), and the cases cited therein—all involve state and local action. The situation is quite different when Congressional action—and particularly Congressional action pursuant to the thirteenth and fourteenth amendments—is involved. Only Congress, not a state legislature or a state Board of Regents, has the explicit constitutional power to devise remedies for past racial discrimination. It has been a century since this Court last struck down a statute enacted by Congress pursuant to this power. In the area of sex discrimination, where the use of suspect classifications has been carefully examined, this Court has explicitly approved Federal statutes that include gender classifications designed to compensate for past discrimination against women. *E.g., Califano* v. *Webster*, 430 U.S. 313, 317 (1977) (approved statutory provision whose " 'only discernible purpose [is] the permissible one of redressing our society's longstanding disparate treatment of women' ") (quoting *Califano* v. *Goldfarb*, 430 U.S. 199, 209 n.8 (1977)).

Second, this Court has repeatedly condoned—even mandated—race-conscious remedies for past discrimination,

to favor—in a rational and appropriate manner—those whose triumph over discrimination lies within the zone of interests intended to be protected by the Civil War Amendments.

because it has recognized that "[a]ny other approach would freeze the status quo that is the very target of all desegregation processes." *McDaniel* v. *Barresi*, 402 U.S. 39, 41 (1971); *see, e.g., International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Associated General Contractors* v. *Altshuler*, 490 F.2d 9, 16-17 (1st Cir. 1973) *cert. denied*, 416 U.S. 957 (1974) and the cases cited therein. Congress should not be discouraged from utilizing such remedies if it deems them appropriate. The imposition of an unrealistic standard of judicial review might well have such an effect.

Finally, even if "strict scrutiny" makes sense when courts are reviewing the race-conscious actions of local government units or federal statutes that are *not* premised on the Civil War Amendments, a lower standard is proper when Congress is clearly acting pursuant to its constitutional powers to remedy the effects of past racial discrimination. This Court should encourage Congress to accept the obligation placed upon it by the framers of the Civil War Amendments. The controversial issues and conflicting public policy concerns raised by the use of race-conscious remedies should be debated and resolved in the forum best suited to consider such questions: the national legislature. Congress, not this Court, was chosen by the framers of the Civil War Amendments to be chiefly responsible for their enforcement. "It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed . . . . It is the power of Congress which has been enlarged." *Ex parte Virginia*, 100 U.S. 339, 345 (1879) (emphasis in original); *see Katzenbach* v. *Morgan*, 384 U.S. 641, 648-649 (1966).

This Court is well aware of the public controversy surrounding statutes like the Set-Aside amendment. That controversy has, to date, largely been thrashed out in amicus briefs filed in this Court. While to some extent this focus is inevitable, the Court can and should now take an important step toward moving the debate to the halls of Congress. It can do so by holding that "strict scrutiny" standards do not apply to race-conscious actions of Congress that are designed on their face to remedy the effects of past discrimination pursuant to the enforcement powers granted in the Civil War Amendments.[14]

B. The Set-Aside Amendment Is Constitutional Notwithstanding the Absence of Detailed Legislative Findings of Discrimination.

Citing scattered *dicta* in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), petitioners claim that the Set-Aside Amendment should be struck down because it was not accompanied by findings of past discrimination against MBEs and it cannot, therefore, be shown to serve a compelling governmental interest. Whatever the proper scope of review, the petitioners' assertion that the constitutionality of a federal statute turns on the volume and specificity of its legislative history is unsupportable.

The Constitution does not require that a legislature conduct hearings, build a record and make formal findings when it passes a law. *Perez* v. *United States*, 402 U.S. 146, 156-57 (1971); *Oregon* v. *Mitchell*, 400 U.S. 112, 147 (1970) (Douglas, J., concurring in part and dis-

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[14] Amici do not, of course, believe that Congress can use these "enforcement" powers under the Civil War Amendments in ways which encourage or entrench discrimination against the very racial minorities the Amendments were designed to protect. *See Katzenbach* v. *Morgan*, 384 U.S. 641, 651 n.10 (1966); discussion in note 13, *supra*.

senting in part); *Katzenbach* v. *McClung*, 379 U.S. 294, 299 (1964); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495 (1937); *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441 (1915) (Holmes, J.). As Professor Cox has noted, "[t]he Court does not review the sufficiency of the evidence in the record to support congressional action . . . and the practice of relying upon the legislative record when it exists should not be taken to show that such a record is required." Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91, 105 (1966) [hereinafter cited as "Cox"].

This rule derives from basic separation of powers principles embodied in the Constitution's grant to Congress of the power to "determine the Rules of its Proceedings." U.S. Const., art. I, § 5. Indeed, when Congress acts pursuant to an express grant of constitutional authority to pass all laws "necessary and proper" or "appropriate" to the exercise of powers conferred upon it—as it did in enacting the Set-Aside Amendment—the courts, far from requiring a detailed legislative history or findings, have "long been committed both to the presumption that facts exist which sustain congressional legislation and also to deference to congressional judgment upon questions of degree and proportion." Cox at 107.

The relevant cases support this analysis. They uniformly hold that a statute "will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961); *James* v. *Strange*, 407 U.S. 128, 133 (1972). In the absence of any legislative history, both the existence of facts supporting the legislature's judgment and the legislature's awareness of those facts will be presumed. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 (1938); *Carmichael* v. *Southern Coal & Coke Co.*, 301

U.S. 495, 509-10 (1937). Indeed, provided the resulting statute is constitutionally supportable, even legislative history or other evidence indicating that Congress may have acted for improper reasons has been found to be constitutionally irrelevant.[15] To put it bluntly, as long as Congress acts within the scope of its constitutional powers, it is not the province of this Court to instruct it on the kind of hearings it must hold or the "findings" it must make.

The judgments of Congress, as opposed to those of a city council or a state legislature (or, for that matter, a state Board of Regents) are entitled to particular deference because Congress alone among the nation's legislatures is the constitutional equal of this Court. Moreover, as a large and popularly elected body Congress is far more likely than the Court to mirror the national will —a consideration of importance in a country founded upon the sovereignty of the people. Judicial restraint in the review of federal statutes follows naturally from the realization that courts "are not representative bodies. They are not designed to be a good reflex of a democratic society." *Dennis* v. *United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring). *See* L. Hand, The Bill of Rights 11-18 (1958); A. Bickel, The Least Dangerous Branch (1962). In reviewing civil rights leg-

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[15] *See, e.g., United States* v. *O'Brien*, 391 U.S. 367, 383-84 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature. . . . It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it."); *Barenblatt* v. *United States*, 360 U.S. 109, 132 (1959) ("So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power."); *Communist Party of U.S.* v. *Subversive Activities Control Board*, 367 U.S. 1, 86 (1961) (Frankfurter, J.).

islation, this Court has often recognized "the special competence of Congress to make findings with respect to the effects of identified past discrimination and its *discretionary* authority to take *appropriate* remedial measures." *Regents of the University of California* v. *Bakke*, 438 U.S. at 302 n.41 (Powell, J.) (emphasis added); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Katzenbach* v. *Morgan*, 384 U.S. 641, 648-653 (1966); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 326-27 (1966); *Katzenbach* v. *McClung*, 379 U.S. 294, 305 (1964); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964).

Respect for the democratic process and the separation of powers is not the only reason why courts do not require legislatures to hold hearings or make express, detailed findings:

> "The principle is not merely one of deference to Congress or the states. It rests upon appreciation of the fact that the fundamental basis for legislative action is the knowledge, experience, and judgment of the people's representatives only a small part, or even none, of which may come from the hearings and reports of committees or debates upon the floor." Cox at 105.

Legislatures are not courts. The latter attend to the development of the law through reasoned elaboration from precedent. They generally act retroactively, deciding only the cases and controversies before them on the basis of a record largely supplied by the parties. Legislatures, by contrast, make law through a process of bargaining, compromise, and "horse trading." Congress is a large, intentionally diverse body whose lot in life is to hammer out laws that please no one fully but stand nonetheless as expressions of the national will. It acts prospectively, drawing information and ideas not merely from hearings, debates, and committee reports but also

from constituents, interest groups, and the executive branch, all of whose contributions, as like as not, are literally "off the record." "In the nature of the case [a legislature] cannot record a complete catalog of the considerations which move its members to enact laws." *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. at 510. Indeed, "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it. . . ." *United States* v. *O'Brien*, 391 U.S. at 384.

Lumping congressional determinations with administrative and judicial findings is therefore inappropriate. Congress will not behave as a court because it cannot (and should not) do so, and imposing judicial formalities upon it will not produce more "reasoned" decisions. The objectives of requiring other tribunals to base their decisions upon express findings, however desirable, will not be advanced by asking—or expecting—Congress to follow suit.[16]

Indeed, requiring findings or a detailed legislative history before permitting Congress to enact legislation would likely produce unintended and undesired consequences. It would, for example, focus attention and resources on the preparation of legislative history rather than more careful consideration of the text of pending bills, because the difference between a void law and a valid one would no longer necessarily be found in the statutes themselves but in the reports and debates accompanying them. The temptation to manufacture legislative history—already overwhelming in the view of many—would doubtless grow. This Court has rejected invitations to look behind statutes expressly to avoid this result: "We decline to void essentially on the ground that it is unwise legislation which Congress had the un-

[16] *See Ohio Contractors Ass'n* v. *Economic Dev. Admin.*, 452 F. Supp. 1013, 1022 (S.D. Ohio 1977), *aff'd*, 580 F.2d 213 (6th Cir. 1978).

doubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *United States* v. *O'Brien*, 391 U.S. at 384.

Moreover, petitioners' arguments fly in the face of the fact that provisions added (as the Set-Aside Amendment was) on the floor of one or both Houses are at least as legitimate, under any sound theory of legislation, as provisions supported by heavy volumes of hearings and committee reports. Floor Amendments such as the Set-Aside have been specifically approved or disapproved by a vote of the entire chamber; there can be no doubt that they command the support of at least a voting majority. However lengthy and detailed the legislative history of some other provision of a bill, it is always a matter of conjecture whether a majority of the legislature would have supported it if it had been voted upon separately. Yet the petitioners would have this Court adopt a rule that severely disadvantages floor amendments—almost by definition unreflected in committee reports and less likely than other provisions to have been addressed at length during hearings—when they are subjected to judicial review. Such a result makes no sense. The legitimacy of legislation derives from its enactment by popularly elected representatives, not from the arguments that their unelected staffs find persuasive enough to write into committee reports.

C. The Facts and Findings Before Congress When the Set-Aside Amendment Was Passed Justified its Enactment as a Remedy for Past Discrimination.

Petitioners point to the legislative history of the Set-Aside Amendment and argue that the brevity of debate on the measure and the absence of either express findings in the statute or a discussion of the Amendment in the House and Senate Reports accompanying the Act demonstrate that the Amendment is not sufficiently supported by detailed, express findings to sustain its constitutionality. But even if such findings were required, the factual record before Congress when the Set-Aside was passed was sufficient to sustain it.

The legislative history of the Set-Aside Amendment in the House and Senate, although brief, conclusively establishes that Congress' purpose in passing the Amendment was to remedy the effects of identifiable past discrimination against minority contractors. Representative Mitchell, in offering the Set-Aside Amendment, stressed that "all this amendment attempts to do is to provide that those who are in minority businesses get a fair share of the action from this public works legislation." 123 Cong. Rec. H1436 (daily ed. Feb. 24, 1977). This was, in Representative's Mitchell's view, "the only sensible way . . . to begin to develop a viable economic system for minorities in this country" because minority enterprise people are "so new on the scene . . . [and] so relatively small that every time [they] go out for a competitive bid, the larger, older, more established companies are always going to be successful in underbidding [them]." *Id.* at H1437. Senator Brooke, who introduced the Set-Aside provision in the Senate, voiced a similar concern in arguing that the Set-Aside was "a legitimate tool to insure participation by hitherto excluded or unrepresented groups." *Id.* at S3910 (daily ed. March 10, 1977). Others supported the Set-Aside because it would redress the inability of minority-owned businesses to compete effectively "through no fault of their own," *id.* at H1440 (daily ed. February 24, 1977) (remarks of Rep. Conyers); and it would insure that the PWEA would not be inequitable to minority businesses, *id.* at H1440 (remarks of Rep. Biaggi).[17]

[17] So clear was Congress' intent that at least one of the amici *supporting* petitioners concedes that "Congress, in enacting the minority business set-aside, was obviously attempting to direct

The record before Congress was not, moreover, limited to the debates and findings accompanying the PWEA. A legislature is free to (and does) consult a range of extrinsic sources of factual material, ideas, and opinion—including the reports and data generated by other branches of the federal government and its own prior legislative activities. This Court, when seeking clues to congressional intent or referring to information upon which Congress may be said to have based a judgment, has therefore not hesitated to go beyond the bounds of formal legislative history and to consider all material generally available to Congress and on which Congress may reasonably have relied, particularly when considering subjects (such as civil rights) marked by intense and sustained legislative activity. *See South Carolina* v. *Katzenbach*, 383 U.S. 301, 330 (1966); *Katzenbach* v. *Morgan*, 384 U.S. 641, 653, 655-58 (1966); *Oregon* v. *Mitchell*, 400 U.S. 112, 132-34 (1970).[18]

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public works contracts to certain classes of U.S. citizens deemed to be historical victims of racial and ethnic discrimination. . . ." Brief of The Anti-Defamation League of B'Nai B'Rith, Amicus Curiae, in Support of Petitioners at 7 (1979).

[18] *See also Ohio Contractors Ass'n* v. *Economic Dev. Admin.*, 452 F. Supp. 1013, 1022 (S.D. Ohio 1977) *aff'd.* 580 F.2d 213 (6th Cir. 1978) ("A court is not limited to the 'record' compiled by Congress in its determination of the necessity of a particular piece of legislation to cure an evil of compelling importance. To the extent that the assumptions underlying a Congressional finding of necessity are verified in separate but reliable reports and studies not in the 'Congressional Record' of the legislation, the Court may consider such data."); *Rhode Island Chapter, Associated General Contractors* v. *Kreps*, 450 F. Supp. 338, 355 (D.R.I. 1978) ("Judicial review takes into account any facts, not necessarily those actually considered by Congress, that underlie and support the congressional assumption that the effects of past discrimination continue, particularly when those facts are so well known and have been exhaustively documented in congressional reports, presidential commissions and countless other proceedings over the past two decades.") (citations omitted).

When it enacted the Set-Aside Amendment in 1977, Congress had before it twenty years of legislative, executive, and judical findings that confirm the facts that petitioners would have the Court believe Congress neither addressed nor determined. Indeed the volume of material available to Congress in 1977 on the problems facing MBEs—and the broader issue of economic discrimination against minorities—is large and persuasive enough, standing alone, to explain the brief legislative history of the amendment. The fact and history of racial discrimination in this country, in economic as well as social and political affairs, is writ too large for this Court to require its rediscovery and recitation in every civil rights statute. As succinctly phrased by the Second Circuit, "the lack of extended discussion clearly indicates the knowledge of the congressmen concerning the well-established history of past discrimination in the construction industry." *Fullilove* v. *Kreps*, 584 F.2d at 605-06 n.10. *See Rhode Island Chapter, Associated General Contractors* v. *Kreps*, 450 F. Supp. 338, 348 n.4 (D.R.I. 1978) ("Congress has sufficiently familiarized itself over the past decade with the nature of discrimination that it need not repeat lengthy legislative findings of fact.").

When Congress enacted the Set-Aside Amendment early in 1977 it had before it, first, a decade and a half of "comprehensive legislation . . . for the benefit of those minorities who have been victims of past discrimination." *Fullilove* v. *Kreps*, 584 F.2d at 605.[19] Virtually all of

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[19] The statutes cited by the Second Circuit include: Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 28 U.S.C. § 1447; 42 U.S.C. §§ 1971, 1975a-1975d, 2000a to 2000h-6); Pub. L. No. 92-261, §§ 2-8, 10, 11, 13, 86 Stat. 103-113 (codified at 42 U.S.C. §§ 2000e, 2000e-1 to 2000e-6, 2000e-8, 2000e-9, 2000e-13 to 2000e-17); Pub. L. No. 92-318, title IX, § 906(a), 86 Stat. 375 (codified at 42 U.S.C. §§ 2000c, 2000c-6, 2000c-9); Pub. L. No. 98-608, § 3(1), 88 Stat. 1972 (codified at 42 U.S.C. § 2000e-4) Pub. L. No. 94-273, § 3(24), 90 Stat. 377 (codified at 42 U.S.C. § 2000e-14); Voting Rights Act of 1965; Pub. L. No. 89-110, 79 Stat. 437; Pub.

this legislation was preceded by exhaustive hearings, enacted only after extensive debate, and accompanied by specific findings of past social, political, and/or economic discrimination.

Second, Congress had before it reports by a variety of congressional committees that repeatedly found discrimination against minorities to be a principal cause of their underrepresentation in the private sector. Thus, on the basis of five days of hearings the House Select Committee on Small Business concluded in 1972 that "the minority businessman does not play a significant role in our economy" due to major problems which, though "economic in nature, are the result of past social standards which linger as characteristics of minorities as a group." H.R. Rep. No. 1615, 92d Cong., 2d Sess. 3 (1972). On two subsequent occasions the Committee has reaffirmed this basic conclusion. *See* H.R. Rep. No. 468, 94th Cong., 1st Sess. 2 (1975); H.R. Rep. No. 1791, 94th Cong., 2d Sess. 182 (1977) (quoted at p. 5, *supra*).

Since passage of the Set-Aside Amendment, Congress has done nothing to disavow these findings. To the contrary, in 1978 Congress enacted a series of amendments to the Small Business Act and the Small Business Investment Act of 1958, Pub. L. No. 95-507, 92 Stat. 1757, Title II of which included specific findings that minorities lack the opportunity for "full participation in our free enterprise system" because they "have suffered the effects

L. No. 90-284, title I, § 103(c) 82 Stat. 75; Pub. L. No. 91-285, §§ 3-6, 84 Stat. 315; Pub. L. No. 91-405, title II, § 204(e), 84 Stat. 853; Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314, 315; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, title II, §§ 204, 206, title IV, § 405, 89 Stat. 402, 404 (codified at 42 U.S.C. § 1971 *et seq.*); Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73-92 (codified at 18 U.S.C. §§ 231-233, 241, 242, 245, 1153, 2101, 2102; 25 U.S.C. §§ 1301-1303, 1311, 1312, 1321-1326, 1331, 1341, 28 U.S.C. § 1360 nts.; 42 U.S.C. §§ 1973, 3533, 3535, 3601-3619, 3631); Pub. L. No. 93-265, 88 Stat. 84 (codified at 25 U.S.C. § 1341). 584 F.2d at 605 n.7.

of discriminatory practices or similar invidious circumstances over which they have no control." The reports accompanying the legislation supported these findings in detail.[20]

Third, Congress could have examined the numerous Presidential documents and executive branch studies and reports discussed by Amici at pp. 5-6, *supra*. For example, Executive Order No. 11,518, 3 C.F.R. 109 (1970), expressly states that "members of minority groups traditionally have aspired to own their own businesses," but that "members of certain minority groups through no fault of their own have been denied the full opportunity to achieve these aspirations." The long history of frustration and lost potential of minority business, and the potential contribution of minority businesses to the nation's economy were reemphasized by the President in his 1971 Message to Congress on Expansion of Minority Enterprise Program, H.R. Doc. No. 169, 92d Cong., 1st Sess. 4 (1971), and again in 1972 in his Message to Congress on Minority Enterprise, H.R. Doc. No. 194, 92d Cong., 2d Sess. 1 (1972). *See also* Exec. Order No. 11,625, 3 C.F.R. 213 (1971).[21]

[20] *See, e.g.*, H.R. Rep. No. 949, 95th Cong., 2d Sess. 8 (1978) (many are "socially and economically disadvantaged" as a result of their identification as "members of certain racial categories"); S.Rep. No. 1070, 95th Cong., 2d Sess. 14-15 (1978) ("[A] pattern of social and economic discrimination that continues to deprive racial and ethnic minorities, and others, of the opportunity to participate fully in the free enterprise system." The act is justified because of "the historic past discrimination of minorities as a group in their efforts to participate in the free enterprise system."); H.R. Rep. No. 1714, 95th Cong., 2d Sess. 20-21 (1978); S. Rep. No. 31, 96th Cong., 1st Sess. 107, 123-24 (1979).

[21] *See also* President's Advisory Council on Minority Business Enterprise, Minority Enterprise and Expanded Ownership: Blueprint for the 70s, at 5, 10-18 (1971). The Executive Departments have conducted their own studies of discrimination against minority-owned businesses, and the results of many such studies were available to Congress in 1977. The Department of Commerce's Office of Minority Business Enterprise in a series of reports

Fourth, Congress could have taken heed of the decisions of this and other Federal courts. Since the early 1950's literally hundreds of cases have concluded with a finding of racial discrimination in the exercise of political, economic, or social rights. This Court has itself observed and passed upon racial and ethnic discrimination on scores of occasions since 1954. Federal court cases finding discrimination in the construction industry are so numerous, and the sorry record of the industry is so clear, that only last Term this Court, citing half a dozen cases and numerous other authorities, observed that "[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a

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published during the 1970s has documented how prejudice, poor educational opportunity, and limited access to real management positions, resulting from the exclusion of minorities from various sectors of our economy, have all contributed to the severe shortage of minority entrepreneurs with general business skills in today's marketplace. *See, e.g.*, OMBE, U.S. Dep't of Commerce, Building Minority Enterprise 2 (1970); OMBE, U.S. Dep't of Commerce, Progress Report: The Minority Business Enterprise Program 1972, at 3 (1972); OMBE, U.S. Dep't of Commerce, Report of the Task Force on Education and Training for Minority Business Enterprise 17 (1974); OMBE, U.S. Dep't of Commerce, Federal Procurement and Contracting Training Manual for Minority Entrepreneurs 38-39 (1975); OMBE, U.S. Dep't of Commerce, Minority Enterprise Progress Report (1976).

OMBE has not been alone in its conclusion. The Department of Health, Education and Welfare has cited "barriers of racial discrimination" as an obstacle to minority entrepreneurs seeking credit, Office of Education, U.S. Dep't of Health, Education and Welfare, Minority Ownership of Small Business: Instructional Handbook 1 (1972), and has published a collection of case histories of minority businesses demonstrating the reality and effect of racial discrimination, Office of Education, U.S. Dep't of Health, Education and Welfare, Minority Ownership of Small Business: Thirty Case Studies (1972). The General Accounting Office, examining the effect of Federal programs designed to aid minority businesses, cited social discrimination as a factor that has limited the growth of minority business enterprises. General Accounting Office, Limited Success of Federally Financed Minority Businesses in Three Cities 5 (1973).

proper subject for judicial notice." *United Steelworkers* v. *Weber*, 99 S.Ct. 2721, 2725 n.1 (1979).[22]

Finally, Congress might well have taken notice of the facts on minority enterprise reflected in the reports of the Census Bureau and discussed at pp. 2-4, *supra*. These statistics, a proper subject for judicial notice,[23] demonstrate conclusively that minorities are underrepresented in the ownership and management of private companies, and give rise to an inference that this is the result of prior racial discrimination. *See International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339 n.20 (1977); *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977).

Given the legislative history and the facts available to Congress when it enacted the Set-Aside Amendment in 1977, the argument that Congress neither made a "finding" of past discrimination nor intended the amendment to remedy the effects of such discrimination must be rejected.

D. The Set-Aside Amendment Satisfies the Other, Stricter Standards of Review Suggested by Members of This Court.

1. *The Statute Satisfies the Test Suggested by Mr. Justice Brennan.*

In an opinion for four members of the Court in *Bakke*, Mr. Justice Brennan suggested an alternative standard of review for racial classifications designed to serve remedial purposes. Under that standard, such classifications are to be sustained if they serve important

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[22] *See also Rhode Island Chapter, Associated General Contractors* v. *Kreps*, 450 F. Supp. at 355-56 and the cases cited therein.

[23] *Mitchell* v. *Rose*, 570 F.2d 129, 132 n.2 (6th Cir. 1978), *United States* v. *United Bhd. of Carpenters & Joiners, Local 169*, 457 F.2d 210, 214 n.7 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972); *cf. Castaneda* v. *Partida*, 430 U.S. 482, 486-89 (1977).

and articulated governmental objectives and if they are substantially related to achievement of those objectives; they are to be overturned if they are used to stigmatize a minority group. *See also United Jewish Organizations* v. *Carey*, 430 U.S. at 163 (race-conscious reapportionment upheld when found "*reasonably related* to the constitutionally valid statutory mandate of maintaining nonwhite voting strength") (emphasis added).

Of course, the *Bakke* standard was not designed for cases like this one, where Congress has specifically created a racial classification for the purpose of enforcing the Civil War Amendments. In *Bakke*, the classification was created by a state agency lacking the constitutional powers accorded to Congress. But even if the standards suggested in Mr. Justice Brennan's opinion were applied in this case, the Set-Aside Amendment would pass muster.

Congress' manifest purpose of remedying the effects of past discrimination against minority business enterprises in the construction industry is obviously sufficiently important to meet the first element of Justice Brennan's test. Certainly, as the facts set forth above demonstrate, Congress had a sound basis for believing that the problem of underrepresentation of minorities in the construction industry had been both "substantial and chronic;" that this serious and persistent underrepresentation was the result of handicaps under which minorities labor as a result of deliberate, purposeful discrimination against them in the private sector generally and in the construction industry specifically; and that these handicaps had impeded full participation by minority enterprises in the economic marketplace. Congress also had substantial reasons to believe that this pattern of underrepresentation would be perpetuated indefinitely if the Set-Aside provision or some similar measure were not enacted.[24]

[24] Justice Brennan stressed in *Bakke* that cases decided under Title VII have made clear "that, in order to achieve minority participation in previously segregated areas of public life, Congress may require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination." 438 U.S. at 366. That is all Congress has done in this case.

Moreover, Congress' use of the set-aside techinque was not unreasonable in light of its objectives. Increasing the level of participation of MBEs in the construction industry, the manifest purpose of the Set-Aside, could not reasonably have been achieved without the Set-Aside Amendment. Where racial discrimination has been found, race-conscious remedies may be needed. As this Court noted in *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 46 (1971):

> "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."

Finally, the Set-Aside Amendment satisfies the last portion of Justice Brennan's test: that the classification not stigmatize any discrete group or individual or single out those least well represented in the political process to bear the brunt of the effects resulting from the classification.[25] The Set-Aside did not burden any discrete and insular, or even any identifiable, non-minority group in any significant matter. Its sole effect on "majority" contractors was to restrict their possible business to 99¾%—rather than 100%—of the funds expended on construction work in late 1977 and early 1978. *See Fullilove* v. *Kreps*, 584 F.2d at 607; *United Jewish Organizations* v. *Carey*, 430 U.S. at 165-68.

[25] Contrary to petitioners' assertions (Brief for Petitioners at 13; Brief for Petitioner General Building Contractors of New York State at 32-33), the Set-Aside does not stigmatize the MBEs that it is designed to benefit. The Set-Aside was designed to allow MBEs to establish a sufficient economic foothold to compete with existing construction enterprises. The program has achieved notable success in this regard. *See* Interim Report at 19, 24.

In sum, the Set-Aside Amendment does not violate the Equal Protection and Due Process clauses of the fifth and fourteenth amendments when judged by the standard of review articulated by Mr. Justice Brennan in *Bakke*.

2. *The Statute Meets Even the Most Stringent "Strict Scrutiny" Test.*

The Second Circuit, applying the strict scrutiny standard to the Set-Aside Amendment, concluded that the Amendment did not violate the Constitution. Although application of such a strict standard of review is not warranted, *see* pp. 17-19, *supra*, the Second Circuit correctly applied the standard to the facts of this case.

Under the strict scrutiny standard, a government practice or statute can only be justified if it furthers a compelling governmental purpose and if no less restrictive alternative is available. *See, e.g., San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 16-17 (1973); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972). Petitioners have conceded—and the court below properly concluded—that the government has a compelling interest in remedying "the vestiges of present and/or past discrimination." *Fullilove* v. *Kreps*, 584 F.2d at 603. The Second Circuit also concluded that Congress' manifest purpose in enacting the Set-Aside was to remedy past racial discrimination, and that such discrimination has in fact occurred. *Id.* at 605-06. Neither finding is vulnerable to serious challenge.

Congress' intent in enacting the Set-Aside provision is so clear as to be beyond dispute. The sponsor of the floor amendment in the House of Representatives containing the Set-Aside provision, Congressman Mitchell, explained that the Set-Aside was intended to target funds for minority enterprises to insure that "they get a fair share of the action from this public works legislation." 123 Cong. Rec. H1436 (daily ed. Feb. 24, 1977). As the

Second Circuit noted, "any purpose Congress might have had other than to remedy the effects of past discrimination is difficult to imagine." *Fullilove* v. *Kreps*, 584 F.2d at 605.[26]

Moreover, Congress' remedial actions in enacting the Set-Aside were predicated on and were consistent with a substantial and uniformly supportive record. The legislative record, viewed in its entirety, establishes the following critical points: (1) the historical presence of discrimination in the construction industry against minorities and MBEs; (2) the present effect of this past discrimination of precluding MBEs from successfully bidding competitively against older, more established, and bigger non-minority firms; and (3) that absent a Set-Aside, MBEs' inability to compete on an equal footing likely will continue. Indeed, the compelling nature of the legislative record concerning the Set-Aside Amendment has already been acknowledged by four members of this Court in *Bakke*, in the context of a discussion of the scope of Title VI:

> "The legislative history of this race-conscious legislation [the Set-Aside Amendment] reveals that it represents a deliberate attempt to deal with the excessive rate of unemployment among minority citizens and to encourage the development of viable minority controlled enterprises. It was believed that such a 'set-aside' was required in order to enable minorities, still 'new on the scene' and 'relatively small,' to compete with larger and more established companies which would always be successful in underbidding minority enterprises."

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[26] Petitioners suggest that the Congressional intent in adopting the PWEA and appropriating the funds for Round II was to aid disadvantaged, as opposed to minority, small businesses. Although we do not dispute that this was a general goal of the PWEA, it is no way inconsistent with the more specific goal of remedying the effects of past discrimination.

438 U.S. at 348-49 (Brennan, White, Marshall and Blackmun, J.J., concurring in part and dissenting in part) (footnotes omitted).

Nor is the Set-Aside vulnerable to attack because of the purported availability of less restrictive alternatives. The ten percent Set-Aside was drawn with precision and tailored to serve the legislative objective sought by Congress. Although characterized by Petitioners as a rigid quota, the Set-Aside Amendment is in fact quite flexible. The statutory requirement may be waived in whole or in part;[27] as of September 5, 1978, 589 such waivers had in fact been granted. Interim Report at iv, 18. Among the factors that may be considered in passing on a waiver request are the size of the minority population in the project area, the availability of MBEs in the area, the efforts already made to find MBEs, and any other pertinent factors. *See* EDA, Dep't of Commerce, Guidelines for 10 Percent Minority Business Participation in Local Public Works Grants (Aug. 1977). The Set-Aside, moreover, does not straight-jacket grantees, but enables them to comply with the statutory requirement in a variety of ways depending upon the nature of the project. And the Set-Aside applies only to Round II grants, which were of a limited temporal duration; it does not create a permanent racial preference. *See United Steelworkers* v. *Weber*, 99 S. Ct. 2721, 2734 (1979) (Blackmun, J., concurring). Finally, the size of the Set-Aside is reasonable—indeed modest—when viewed against the fact that at least 16% of the nation's population belongs to one of the minority groups benefitted by the Amendment. *See* p. 3, *supra*.

Congress did not act precipitously in resorting to the Set-Aside as a remedial device. Prior efforts to remedy the effects of past discrimination had failed to produce

[27] The implementing regulations provide that the Assistant Secretary of Commerce can waive the Set-Aside requirement if he determines that the Set-Aside "cannot be filled by minority businesses located within a reasonable trade area determined in relation to the nature of the services or supplies intended to be procured." 13 C.F.R. § 317.19(b)(2) (1978).

meaningful results. The more general provisions of the Civil Rights Act of 1964, although designed to prohibit certain types of discrimination against minorities, have not significantly mitigated the effects on MBEs of past discrimination. And Section 8(a) of the Small Business Act of 1953, 15 U.S.C. § 637(a) (1976), which authorizes the Small Business Administration to grant Government subcontracts to socially or economically disadvantaged businesses, has proved ineffective.[28] Thus, this is not a situation where Congress in the first instance sought to impose a Set-Aside as a remedy for past discrimination. Other remedial measures have been tried and found wanting.

Ignoring this background, petitioners contend that Congress did not in 1977 consider less restrictive alternatives to the Set-Aside, and suggest a variety of alternatives that they characterize as less onerous or burdensome than the means selected by Congress. Brief for Petitioners at 26-28; Brief for Petitioner, General Building Contractors of New York State at 24-31. These alternatives tend to fall into one of two categories: either they avoid racial classifications altogether (*e.g.*, a set-aside provision for economically and socially disadvantaged business enterprises) or they provide assistance to MBEs in a form other than a Set-Aside (*e.g.*, technical, financial and educational assistance programs, encouragement of joint-ventures between non-minority construction firms and MBEs, and/or loans or grants to cover bonding expenses).

[28] According to a 1975 report by the General Accounting Office, the Small Business Administration's "success in helping disadvantaged firms to become self-sufficient and competitive has been minimal." Cong. Research Service, Library of Congress, Minority Enterprise and Public Policy 53 (June 1977). *See also* General Accounting Office, Limited Success of Federally Financed Minority Businesses in Three Cities (1973).

The alleged availability of such alternatives does not undermine the constitutionality of the Set-Aside provision. The suggested alternatives that do not involve racial classifications are no more likely to be effective than the Small Business Administration's Section 8(a) program. The other alternatives are no "less restrictive" than the Set-Aside. They, too, utilize racial classifications and make designated government benefits available only to certain racial groups. *See Constructors Association* v. *Kreps*, 573 F.2d 811, 817 n.23 (3d Cir. 1978). The fact that the benefits suggested by petitioners are less offensive to them than the Set-Aside does not mean that they are less restrictive; in all likelihood it means only that they are less likely to be effective. In fact, petitioners' suggestions would give minority firms a financial advantage in competing for *all* construction contracts and in that sense are far more restrictive than the Set-Aside, which reserved for minorities only about 1/400th of the dollars spent on construction in the United States in 1977. *Fullilove* v. *Kreps*, 584 F.2d at 607-08. The proper body to judge the relative effectiveness and burdens associated with such remedies is clearly the Congress, and not this Court.

II. TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 DOES NOT MANDATE INVALIDATION OF THE SET-ASIDE AMENDMENT.

Petitioners argue that the Set-Aside Amendment should be struck down because it is not consistent with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976).[29] Brief for Petitioners at 28-38; Brief for Petitioner, General Building Contractors of New York State at 33-35. The argument is without merit.

[29] Title VI provides, in its entirety, that: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

A. Title VI and the Set-Aside Amendment Are Consistent and Capable of Coexistence.

"The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974).[30]

Five justices of this Court have agreed that Title VI proscribes only racial classifications that would violate the Equal Protection Clause if employed by a State or its agencies. *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 281-87, 328-55 (1978) (opinions of Powell, J. and Brennan, White, Marshall and Blackmun, J.J.). Because, as Amici have demonstrated above, *see* pp. 12-19, 31-38, *supra*, the Set-Aside does not violate the Equal Protection Clause, it is not inconsistent with Title VI.

The consistency of the Set-Aside Amendment and Title VI is also supported by the decision of this Court in *United Steelworkers* v. *Weber*, 99 S.Ct. 2721 (1979). There, the Court held that quotas designed to increase minority participation in the skilled workforce of a plant could be consistent with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1976). Title VII, in sweeping language similar to that found in Title VI, outlaws employment discrimination on grounds of "race, color, religion, sex, or national origin." The Court held in *Weber* that Title VII does not forbid all voluntary

[30] *See also Administrator, F.A.A.* v. *Robertson*, 422 U.S. 255 (1975); *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939) ("When there are two acts upon the same subject, the rule is to give effect to both if possible. . . .").

private programs designed to eliminate conspicuous racial imbalances through quotas that reserve a specific portion of training program openings for black employees. Given that holding, it is inconceivable that Title VI precludes federal grantees from doing what the Set-Aside Amendment requires them to do in order to receive federal funds.

The rule quoted in *Morton* v. *Mancari* means nothing if it does not mean that the Court will go to greater lengths to reconcile two federal statutes than to reconcile a federal statute and a private contract. It follows from *Weber*, therefore, that a statute designed to eliminate conspicuous racial imbalances in the construction industry by the use of quotas reserving a specific portion of certain federal funds for minority contractors is not necessarily inconsistent with Title VI. Title VI and the Set-Aside Agreement are capable of co-existence and both should be given effect.[31]

[31] In fact, Congress was aware of Title VI when it passed the Set-Aside Amendment and apparently believed the two to be consistent:

> "What is most significant about the congressional consideration of the [Set-Aside Amendment] is that although the use of a racial quota or 'set-aside' by a recipient of federal funds would constitute a direct violation of Title VI if that statute were read to prohibit race-conscious action, no mention was made during the debates in either the House or the Senate of even the possibility that the quota provisions for minority contractors might in any way conflict with or modify Title VI. It is inconceivable that such a purported conflict would have escaped congressional attention through an inadvertent failure to recognize the relevance of Title VI. Indeed, the Act of which this affirmative action provision is a part also contains a provision barring discrimination on the basis of sex which states that this prohibition 'will be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination under Title VI of the Civil Rights Act of 1964.' 42 U.S.C.A. § 6709 (1976). Thus Congress was fully aware of the applicability of Title VI to the funding of public works projects. Under these circumstances, the enactment of the 10% 'set-aside' for minority enterprises reflects a congressional judgment that the remedial use of race is permissible under Title VI."

Regents of the University of California v. *Bakke*, 438 U.S. at 349 (Brennan, White, Marshall and Blackmun, J.J., concurring in part and dissenting in part).

B. To the Extent that Title VI and the Set-Aside Amendment May Be Inconsistent, the Set-Aside Amendment—a Later-Enacted, More Specific Statute—Should Prevail with Respect to the Program of Which it Is a Part.

It is an accepted rule of statutory construction that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton* v. *Mancari*, 417 U.S. 535, 550-51 (1974), *citing Bulova Watch Co.* v. *United States*, 365 U.S. 753, 758 (1961).

Title VI is unquestionably a statute of general application. The Set-Aside Amendment, by contrast, is a narrow and specifically drawn provision that allocates a portion of the funds to be spent on a single program of limited scope and duration. Following the general rule, the Set-Aside Amendment should be regarded as an exception to (or qualification of) Title VI that displaces the latter insofar as it might otherwise govern the distribution of PWEA funds.

The case for the Set-Aside Amendment is further, and finally, bolstered by the fact that it was enacted thirteen years after Title VI. In resolving a conflict between successive statutory enactments that is deemed irreconcilable, the latter enactment should be given priority. *Araya* v. *McLelland*, 525 F.2d 1194, 1196 (5th Cir. 1976).[32]

[32] *See Preiser* v. *Rodriguez*, 411 U.S. 475 (1973); *Hines, Inc.* v. *United States*, 551 F.2d 717, 725 (6th Cir. 1977); *United States* v. *Ohio Valley Co.*, 510 F.2d 1184, 1189 (7th Cir. 1975); *Int'l Union of Elec. Radio & Mach. Workers* v. *NLRB*, 110 U.S. App. D.C. 91, 289 F.2d 757 (1960) (Bazelon, J.).

CONCLUSION

For the foregoing reasons, Amici respectfully submit that the decision of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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